Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

WILLIAM E. BADO,
Petitioner

v.

THE STATE OF NEW JERSEY
Respondent

On Petition For Writ Of Certiorari
To The Supreme Court Of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a police officer has established a reasonable articulable suspicion sufficient to stop a motor vehicle if he has stated observations of lawful acts and a subjective conclusion of an illegal act, but has failed to state reasonable inferences he drew from those facts to arrive at his conclusion.

2. Whether a police officer has such a reasonable articulable suspicion to stop a car when the car does not violate any law based upon a lawful combination of lawful acts, specifically, to sit in one's car for two minutes in gear with the brakes applied before driving, to slow one's rate of speed while passing through a construction zone, and to signal before a turn.

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Petitioner William E. Bado respectfully requests that a writ of *certiorari* be issued to review the Judgement of the Appellate Division of the Superior Court of New Jersey in this case.

OPINIONS BELOW

The Supreme Court of New Jersey in *State of New Jersey v. Bado*, Docket No.47,728, C-1126 of the September Term, 1998 denying *certiorari* is not published, but can be found at Appendix B. The Opinion of the Appellate Division of the Superior Court in *State of New Jersey v. Bado*, App. No. A-4234-97T3 is not published, but can be found at Appendix A. The Decision of the Superior Court in the trial *de novo* of *State of New Jersey v. Bado*, Appeal No 2-98 is not published, but can be found at Appendix C. The Decision of the Municipal Court in *State of New Jersey v. Bado*, Summons No 024839 is not published, but can be found at Appendix D.

STATEMENT OF JURISDICTION

This is a criminal case where a final judgement has been rendered against Defendant by the highest Court in the State in violation of Defendant's rights under the Constitution.

The judgement of the Appellate Division of the Supreme Court was entered on March 10, 1999. (App.A). The Supreme Court of New Jersey denied a timely filed petition for *certiorari* by order filed June 9, 1999. (App.B).

The Jurisdiction of this Court is invoked under 28

U.S.C. 1257 and 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution provides in relevant part: "The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

There are two fundamental questions in this case. The first is whether the officer who stops a vehicle must articulate his observations and inferences to allow a court to determine whether the stop was both objectively as well as subjectively reasonable.

The second is whether specific driving behavior, which is not illegal or even unsafe, can be a reasonable basis for an articulable suspicion. The specific driving behavior was that Defendant sat in the car in a parking space while in gear, but not moving, for a period of about two minutes, drove below the speed limit through a construction zone at night and signaled before a turn.

A. The Proceedings Below.

On December 22, 1997, Mr. Bado's case came before the Municipal Court for trial. First, there was a motion to suppress evidence based upon a lack of a reasonable articulable suspicion to stop the vehicle in which the issues herein were first raised. The motion was denied. See ruling Appendix E.

Mr. Bado was then convicted of Driving While Intoxicated under *N.J.S.A.* 39:4-50 at the conclusion of a trial. The Municipal Court sentenced Mr. Bado to a fine of $250.00, $30.00 costs, a six month suspension of his driver's license, $50.00 VCCB penalty, $75.00 Safe Community Act surcharge, $100.00 D.W.I. surcharge, and 12 hours of re-education in the Intoxicated Drivers Resource Center.

On March 9, 1999, the Appellate Division of the Superior Court of New Jersey ruled unanimously that reasonable articulable suspicion existed because the arresting officer articulated observations of Defendant's driving which despite being wholly lawful, the officer stated indicated driving while intoxicated.

The Defendant petitioned the Supreme Court of New Jersey for certification to review the March 9, 1999 *per curiam* Opinion of the Appellate Division, but certification was denied.

This petition is a search for an imposition of an objective reasonableness standard above and beyond mere articulability of subjective reasons.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS REGARDING THE REQUIREMENTS OF AN OBJECTIVE REASONABLE ARTICULABLE SUSPICION TO STOP A MOTOR VEHICLE.

The level of suspicion required for law enforcement to stop a vehicle is a reasonable articulable suspicion that a particular individual has violated a law. *Delaware v. Prouse*, 440 *U.S.* 648, 663 (1979).

The reasonableness standard must be based upon an objective person's standard rather than a subjective standard. *Terry v. Ohio*, 392 *U.S.* 1, 21-22 (1968).

In the instant action, the Appellate Division upheld the stop of Mr. Bado's vehicle on a combination of legal driving actions: he sat in his car for two minutes while in gear, he drove slower than the speed limit through a construction zone, and he signaled a long but unspecified distance before he turned.

A. New Jersey is Improperly Using a Subjective Rather Than Objective Standard of Reasonableness

The Court stated that "although each of the factors on

which the officer relied was susceptible to an alternative explanation, they also provided a reasonable basis for this patrolman, who had thirteen years of law enforcement experience to suspect that defendant's driving was unusually hesitant and excessively cautious because defendant was aware that his ability to drive safely had been impaired by alcohol."

The decision of New Jersey's Appellate Division is in contradiction to this Court's decisions in *Delaware v. Prouse* and *Terry v. Ohio, supra,* because it relies on the officer's subjective view of these events under a blanket claim that the facts appear different when filtered through his experience.

An officer under the reasonable man test can draw from his experiences if he states for the Court's consideration the specific inferences which bridge his observations and his conclusion. *Terry v. Ohio, supra*, 392 *U.S.*, at 27.

In the case at bar, the officer did not articulate any inferences which he drew which might have lead him to believe that the defendant might be intoxicated. He merely stated his conclusion, that the observations of Defendant's careful driving made him believe defendant was intoxicated.

It must be noted that the above quote from the court is a quote of an inference they speculate he made, but the officer never testified that he drew the same possible inference.

The New Jersey Courts did not require an explanation of what inferences were being drawn by the officer to reach his

conclusion, but merely accepted the officer's conclusion at face value.

Under a subjective standard, if an officer says his opinion was reasonable to him, and if it is articulable, it is reasonable. Such a relaxation of the role of reason opens the door to explanations such as 'I stopped defendant because in my vast experience looking both ways before crossing a street indicates a criminal lookout'.

New Jersey's courts are not requiring an objectively reasonable articulable suspicion to stop a motor vehicle. For this reason, the petition should be granted.

B. The Legal Actions Herein Were Not Furtive Actions

The clear counter-argument of the State will be that some legal actions taken together, in combination, are so well known as indicia of criminal activity that they should be subject to police interference. *See United States v. Cortez*, 449 *U.S.* 411, 421-422 (1981). An example is police observation of behavior indicative of some sort of illegal transaction, such as an exchange of money for a known form of drug packaging in a known drug trafficking area.

Such strong and known indicia of criminality do not exist in the case at bar. Plaintiff was not swerving or weaving without reason, he was merely driving cautiously. Such legal driving, even if considered "excessively cautious" cannot in itself form sufficient grounds to stop a motor vehicle.

As a matter of law, none of Defendant's acts were unlawful. To sit in a car in gear with a foot on the brake is not illegal. Nor is it illegal or even undesirable to proceed slowly through construction, nor to signal before turning. The officer even admitted that the signal was not activated until the block where the "next available" turn was to take place.

May police stop any vehicle because a person eats in his car while in gear with a foot on the brake after exiting a convenience store? What if the driver later slows as he drives through construction and signals a turn, can such safe driving be objectively reasonable grounds to stop a vehicle? Such a ruling would give the police virtually unbridled power to stop motorists, whether or not they see violations of law, for virtually any exhibit of cautionary behavior.

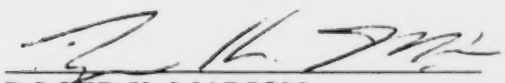
CONCLUSION

This case presents a question of exceptional importance: whether the standard of an objectively reasonable articulable suspicion is fulfilled by the testimony of a police officer who does not articulate his inferences to connect his observations of a defendant's legal conduct and his opinion that defendant may be intoxicated. If the opinion below is allowed to stand, then objective reasonableness as supported by reasonable inferences will not be required in New Jersey for a stop of a motor vehicle. Innocent drivers will become subject to the whims and hunches of the police. In a rejection of the state Court's modification of the reasonable articulable suspicion standard, this Court can reaffirm that such stops must be judged based on an objective

standard.

Accordingly, William Bado respectfully requests that his petition for writ of *certiorari* be granted.

Respectfully submitted,



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EXHIBITS

APPENDIX A

OPINION OF THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY FILED MARCH 10, 1999

The State of New Jersey
Plaintiff-Respondent

vs. Docket No. A-4234-97T3

William Bado
Defendant-Appellant

Submitted January 26, 1999
Decided Before Judges Pressler and Brochin

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County

Lomurro, Davison, Eastman & Munoz, attorneys for appellant (Donald M. Lomurro, of counsel; Gary P. McLean, on the brief).

John Kaye, Monmouth County Prosecutor, attorney for respondent (Mark P. Stalford, Assistant Prosecutor, of counsel land on the brief).

PER CURIAM

Following denial of a motion to suppress evidence, the

Atlantic Highlands Municipal Court convicted defendant William E. Bado, Jr. of driving while intoxicated in violation of N.J.S.A. 39:4-50 and sentenced him to a six months' suspension of his driving license, to a $250 fine, $30 costs, and appropriate penalties and surcharges. On appeal to the Law Division, he was again convicted of the same offense and the same sentence was imposed.

Defendant has appealed to this court. He challenges only the denial of his motion to suppress. For the following reasons, we affirm.

Defendant's motion to suppress is based on his contention that Atlantic Highlands Patrolman David Rossbach was acting illegally when he stopped the car defendant was driving. It is only the stop that is contested. Defendant implicitly concedes that the officer's observation following the stop justified the roadside sobriety test to which defendant was subjected and that the manner in which he performed the test warranted his arrest and the administration of a breathalyzer test at police headquarters.

A police officer is authorized to stop a motor vehicle being driven on a public street or highway if the officer has an articulable basis for a reasonable suspicion that an occupant of the vehicle is violating a penal law or motor vehicle regulation. Delaware v. Prouse, 440 U.S. 648, 663,99 S. Ct 1391, 1401, 59 L. Ed. 2d 660, 673 (1979); State v. Williamson, 138 N.J. 302, 304 (1994); State v. Zapata, 297 N.J. Super. 160, 171 (App. Div. 1997), certif. denied, 156 N.J. 405 (1998). In the present case, the State contends that Patrolman Rossbach had an articulable basis for a reasonable suspicion that defendant was driving while intoxicated in violation N.J.S.A. 39: 4-50. The

State also invokes the community caretaking function of the police as justification for the stop. However, because a driver operating a motor vehicle in a condition of intoxication which warrants exercise of the caretaking function of the police is also violating a penal statute, there is no necessity for our deciding whether community caretaking is an additional justification for the stop in this case. The sole issue for us to decide is whether Patrolman Rossbach had an articulable basis for a reasonable suspicion that defendant was driving while intoxicated.

The following are the facts pertinent to that issue. With one exception, which we will note, the relevant testimony is uncontradicted.

At approximately 2:00 a.m. on Wednesday, June 4, 1997, Patrolman Rossbach was seated behind the wheel of his marked patrol car, parked in a store parking lot across the street from a convenience store. The officer saw an automobile with its brake and back-up lights on, parked in the convenience store parking lot. He noted that the automobile remained motionless with its brake and back-up lights still on for approximately two minutes before it backed out of its parking space and drove out onto the street. Officer Rossbach followed the automobile. It traveled for four blocks in a twenty-five mile per hour zone at a speed that the policeman testified was between five and ten miles per hour and that defendant testified was fifteen miles per hour. The municipal court judge, and the Law Division judge on appeal, accepted the policeman's estimate. A block before turning left, the driver of the automobile signaled for a left turn. In all respects other than those mentioned, the manner in which the automobile was being driven was unremarkable. Officer Rossbach stopped the automobile after it had made the left turn.

The formal point headings of defendant's argument assert that "the community caretaking function is inapplicable to the present matter" and that "the court's reliance on a comment by the municipal persecutor in reaching its decision was inappropriate." As we have already indicated, whether or not the caretaking function is applicable to the facts of this proceeding is immaterial. Defendant's second point refers to a representation by the prosecutor made after the testimony was completed that if Patrolman Rossbach had been asked, he would have testified that road construction on the street on which defendant was driving, which defendant said was still unfinished on June 4, 1997, had, in fact, already been completed by that date. The representation was improper, but it did not affect the decision of the case.

Defendant also argues that the circumstances which Patrolman Rossbach observed did not give him a basis for a reasonable suspicion that defendant was driving while intoxicated because each of the facts on which the officer relied had an innocent explanation. According to defendant, he put his car into reverse and kept his foot on the brake because he was putting the cup of coffee that he had purchased in the convenience store in his cup holder, he was tuning his radio, and he was talking to this passenger. Defendant claims that he was driving at fifteen miles an hour because he was somewhat unfamiliar with the route and there were orange cones in the middle of the orad to indicate a construction zone. He testified that he properly signaled for a left turn as soon as he had passed the intersection immediately before the one at which he intended to turn.

There was no evidence, however, that Patrolman Rossbach saw, or could have seen, defendant's passenger or

defendant's activities inside his automobile. The municipal court judge and the Law Division judge accepted the officer's estimate of defendant's driving speed and rejected defendant's efforts to disprove the estimate by showing its inconsistency with the time and distance estimates which the patrolman had tentatively accepted on cross examination. Although each of the factors on which the officer relied was susceptible to an alternative explanation, they also provided a reasonable basis for this patrolman, who had thirteen years of law enforcement experience, to suspect that defendant's driving was unusually hesitant and excessively cautious because defendant was aware that his ability to drive safely had been impaired by alcohol. The patrolman's observations were therefore sufficient to justify an investigative stop.

The judgement appealed from is affirmed.

APPENDIX B

ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING CERTIFICATION FILED JUNE 9, 1999

The State of New Jersey
Plaintiff-Respondent

vs. ON PETITION FOR CERTIFICATION

William Bado
Defendant-Petitioner

To the Appellate Division, Superior Court:

A petition for certification of the judgement in A-4234-97 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 7th day of June, 1999.

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APPENDIX C

ORDER OF THE SUPERIOR COURT OF NEW JERSEY COUNTY OF MONMOUTH LAW DIVISION AFFIRMING CONVICTION AFTER TRIAL *DE NOVO* FILED MARCH 27, 1998

The State of New Jersey
Respondent

Appeal No. 2-98

vs.

Judgement Of Conviction and Sentence on Appeal

William Bado
Defendant-Appellant

This matter having been brought before the Court by defendant-appellant on appeal from the judgement of conviction entered against him in this case in the municipal court of the Borough of Atlantic Highlands on the 22 day of December, 1997, and Jason Styrinski, Legal Assistant, for the county of Monmouth appearing, and the defendant-appellant in person and by counsel appearing, Gary McLean, Esq. it is on this 20 day of March, 1998, adjudged on trial de novo that the defendant-appellant is guilty of the offense(s) of 39:4-50 as charged, and is hereby convicted of said offense(s). It is adjudged that the defendant-appellant is hereby sentenced to $250.00 fine and court costs of $30.00 payable to the Atlantic Highlands municipal court.

Driving privileges are hereby revoked for a period of six (6) months, VCCB $50; SNSF $75; IDRE 12 hours; $100 surcharge.

APPENDIX D

DECISION OF THE MUNICIPAL COURT OF THE BOROUGH OF ATLANTIC HIGHLANDS ENTERED ON ORAL RECORD ON DECEMBER 22, 1997

The Court: Okay. Again, we have the officer's, his continued testimony in the case that after, at least in his won mind, finding probable cause as we have previously set forth here. Pulled the gentleman over, alcohol from the car, the gentleman's breath. He asked the gentleman to perform some psychophysical tests, alphabet test. The gentleman could not recite. Head tilted he was swaying. He couldn't keep his head back or his eyes closed. Leg lift, on both legs, balance both times. And counting backwards, stopped 79 and was unable to continue that.

He was Mirandized, brought to the station. No further psychophysical given. At which point and, again, I don't have an operator's card in front of me, but there is a stipulation that one, the machine was in proper working order. The officer is qualified to use the machine and the proper, and the test was administered in a proper fashion. The two readings being a .15. Both, of course, above the per se limit.

Based on those circumstances, as well as the psychophysical, I would have to make a guilty finding with respect to this particular gentleman. Is it a first offense?

Mr. Lomurro: Yes, Judge.

The Court: Okay. I have no problem with the minimums. There was no accident involved, unless the State

wants to be heard. No?

Mr. Locascio: No objection.

The Court: Okay. The fine will be 250, costs 30. The $100 DWI surcharge, the $50 Victims of Crime Compensation Board surcharge, $75 Safe Communities Act surcharge, 12 hour IDRC commitment, six month loss of license, which are the minimums. And, Counsel, having said that, you indicated you might request a stay.

APPENDIX E

RULING OF MUNICIPAL COURT ON PROBABLE CAUSE ISSUE ENTERED ON ORAL RECORD ON DECEMBER 22, 1997

(In Pertinent Part)

THE COURT: Okay, thank you. This is a, basically, a motion to suppress evidence. The question is whether the officer had probable cause to stop the vehicle. And it is a case where, really, not a lot is in contention factually.

The officer has testified that the gentleman, the gentleman agrees, that he was at the Mike's Convenience Store. This is about 2:30 in the morning. And that the officer was across the road in the Copper Basket parking lot. He saw the gentleman's reverse lights go on.

He did not see the gentleman enter the car. He saw the gentleman's reverse lights go on and he remained motionless, although the reverse lights were on for approximately two minutes, which initially drew his attention. Saw the gentleman exit and head northbound on First Avenue.

And it is the officer's testimony that he was going very slow, perhaps five to ten miles per hour in a 25 mile an hour zone. He pu' his left hand signal on well in advance of Center Avenue, which was his ultimate destination. And did eventually make that turn.

The defendant has testified, and I don't think there is any, again, contention here. He was with another individual in the car whom he was, apparently had been out with that evening.

That he does agree that he had his reverse and/or brake lights on for a period of time. And that he really didn't violate any speeding laws, pardon me, any other motor vehicle law.

Perhaps in terms of speeding, in a low speed, he indicates there was construction going on in the middle of First Ave. and that is the reason he took care for five to ten miles per hour, although he indicates, ironically, that he was going faster than what the officer said, which is not something you hear very often.

But the bottom line is, the question is here not proof beyond a reasonable doubt, but whether is the reasonable articulable suspicion on behalf of the officer probable cause to believe that the motor vehicle law has been violated.

The other point that I think has to be made is also whether the officer-- Here the officer indicates that, that was indication to him, these three factors. In terms of speed, the brake lights, reverse lights as well as the turn signal before the turn added up to drunken driving.

In addition, although, there is also probable cause perhaps that another motor vehicle law had been broken with respect to the low speed.

So, taking the three of them together, the three factors, I believe there is probable cause to make the stop. I will grant the contention of the defendant that the reverse lights for two minutes, in and of itself, I don't think amounts to any probable cause to stop. And I don't think making a left hand turn signal, in and of itself, although I have seen that in conjunction in other DWI cases with someone who is putting on the left had signal

too early. But I don't think that, in and of itself, certainly is not a violation.

But, I think going the slow speed -- The gentleman indicates that there was, there were cones in the middle of the road and that he had to, therefore, go to the right of the road which is fine. Doesn't seem like a problem. Obviously, there is no construction at 2:30 in the morning. And, but it is clear, though, that at that speed that the officer sensed that there was a problem in conjunction with the two other items.

So, I do believe there was probable cause for the stop. I believe the two items, one and two, are contributing. But I think the main one was the fact that the speed was extremely slow. Five miles an hour, ten miles an hour, with no one else on the road certainly indicates, especially with the community caretaker function, that there was a problem and that the officer should have investigated. He did and we are here tonight with respect to these charges.

So that is the granting of the, pardon me, the denial of the motion on that, but how do you want to proceed from here, gentleman?

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No. 99-564

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WILLIAM E. BADO,

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THE STATE OF NEW JERSEY,

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On Petition For Writ Of Certiorari To The Supreme Court Of New Jersey

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QUESTION PRESENTED FOR REVIEW

Whether observation of a motor vehicle violation for which a citation could be issued is a necessary prerequisite to a valid investigative stop of the motor vehicle.

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STATEMENT OF JURISDICTION

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1257. This Court has no appellate jurisdiction, because the instant petition for *certiorari* is untimely. 28 U.S.C. § 2101(d); SUP. CT. R. 13.

The time to make application for a writ of *certiorari* to review the judgment of a State court in a criminal case is governed by the rules of the Supreme Court. 28 U.S.C. § 2101(d). To timely file a petition for a writ of *certiorari*, the applicable Supreme Court Rule provides ninety days from the date that the highest state court denies discretionary review of the judgment of a lower state court. SUP. CT. R. 13(1). The time begins to run from the date the judgment is entered, and not from the date the order is issued. SUP. CT. R. 13(3).

In this case, the New Jersey Supreme Court denied discretionary review of the Superior Court, Appellate Division's judgment on June 7, 1999, by order dated June 9, 1999. Pet. App., at p. 6a. Therefore, in this case, time to file a petition for a writ of *certiorari* expired on September 5, 1999.

Petitioner's application for the writ was filed on September 30, 1999 and docketed on October 1, 1999. Respondent has not been noticed that petitioner has applied for, nor been granted, any extension of time to file his petition. *Compare* SUP. CT. R. 13(5) *with* SUP. CT. R. 30(4). Because of its untimeliness, it appears the instant petition should not have been filed at all. SUP. CT. R. 13(2).

Respondent requests that the instant petition be dismissed on the ground that this Court is without jurisdiction to entertain it, because petitioner's application is out of time.

CODIFIED LAW INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . "

U.S. CONST. amend. IV.

" . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. CONST. amend. XIV.

"A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood . . . shall be subject [to the penalties that follow]."

N.J. STAT. ANN. 39:4-50(a) (West 1998).

SUMMARY OF THE ARGUMENT

A sound exercise of discretion requires denial of petitioner's application for a writ of *certiorari*. The petition presents no compelling question. It merely reflects petitioner's disagreement with the state courts' application of a well-settled rule of law to the not-so-peculiar facts of petitioner's case. Petitions of the character presented herein "rarely" are granted. SUP. CT. R. 10. No exception is warranted in the case at bar.

There is a second reason for denying the instant petition: the state courts correctly applied the proper legal standard to the facts of petitioner's case. The patrolman articulated facts that supported an objectively reasonable suspicion that petitioner's faculties were impaired and he was incapable of safe operation of his motor vehicle. The patrolman had thirteen years of law enforcement experience. The incident occurred at approximately two o'clock in the morning. The patrolman observed petitioner inexplicably pause for approximately two minutes in a parking lot with his reverse lamps lit. The patrolman then observed petitioner travel at five to ten miles per hour in a twenty-five mile per hour zone. The patrolman further observed petitioner activate his left turn signal well in advance of actually making the intended turn.

These all are objective manifestations that would lead a reasonable police officer to suspect that petitioner's judgment and perception might be impaired, and control over his vehicle was affected as a consequence. The law in all jurisdictions consistently has so held. Because the stop of petitioner's vehicle was supported by articulable

facts giving rise to an objectively reasonable suspicion, the stop was constitutionally valid. The petition for a writ of *certiorari* should be denied.

LEGAL ARGUMENT

Petitioner's argument in support of his petition for a writ of *certiorari* is essentially twofold. First, petitioner points out that none of the articulable facts that the police officer identified as supportive of his suspicion would constitute a basis for issuing a motor vehicle violation. In other words, none of petitioner's acts, in and of themselves, were unlawful. Pet. Brief, at pp. 6-7. Petitioner thus contends that, because none of his acts were independently unlawful, there was no basis upon which reasonable, articulable suspicion could be found to justify an investigative stop.

Second, drawing from this premise, petitioner deduces that New Jersey must be applying a subjective legal standard to measure the constitutionality of motor vehicle stops. Pet. Brief, at p. 6. Petitioner reasons that, if the officer did not observe him violating law but the stop nonetheless was upheld, then the court must have been relying on the officer's subjective view of the events to deem the stop reasonable. Pet. Brief, at p. 5. Utilization of this subjective analysis, petitioner argues, is contrary to the objective standard this Court announced in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979), and *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), and it requires corrective intervention by this Court by virtue of granting petitioner a writ of *certiorari*.

As a threshold matter, respondent objects to petitioner's characterization of New Jersey law as approving a subjective standard for evaluating reasonable, articulable suspicion. *Cf.* SUP. CT. R. 15(2).

In *State v. Thomas*, 542 A.2d 912 (N.J. 1988), the New Jersey Supreme Court explicitly adopted the objective standard set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968), as governing investigative stops in this State. *See also State v. Citarrella*, 712 A.2d 1096, 1099-1100 (N.J. 1998); *State v. Arthur*, 691 A.2d 808, 810 (N.J. 1997). This objective standard was applied to the facts of petitioner's case. *See* Pet. App., at p. 2a (following *State v. Williamson*, 650 A.2d 348 (N.J. 1994), which, at *id.* 350, ordered a remand to determine "whether the trooper had an objective basis to believe that a traffic violation occurred."). The New Jersey courts thus were applying the objective standard for adjudging reasonableness, *i.e.*, they were following a correctly stated rule of law.

To argue nonetheless that New Jersey is utilizing a subjective standard to assess reasonable suspicion, petitioner emphasizes the fact that Patrolman Rossbach "did not articulate any inferences which he drew which might have lead (sic) him to believe that the defendant might be intoxicated." Pet. Brief, at p. 5. Petitioner notes that the courts articulated reasonable inferences that could be drawn from the facts of his case, but contends that the law required Patrolman Rossbach first to articulate those inferences.

Petitioner's argument is legally unsubstantiated. First, as a general matter, a police officer's particular, subjective thought processes are not relevant, let alone

necessary, in determining whether a search or seizure was reasonable. *United States v. Whren*, ___ U.S. ___, 116 S.Ct. 1769 (1996). "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action." *Id.* at 1774 (quoting *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 1723 (1978)).

Second, there is nothing to suggest that the New Jersey courts merely "adopted" Rossbach's determination that the stop of petitioner's vehicle was reasonable under the circumstances – not because of his "experience" or otherwise. Rather, the courts' analyses reflect that they reviewed the objective facts that Rossbach articulated; they gave proper weight to the inferences that a reasonable patrolman could draw from those facts in light of thirteen years of law enforcement experience; and, they then independently decided whether such facts and inferences supported an objectively reasonable suspicion. *See* Pet. App., at pp. 3a, 5a, 10a-12a. This analysis was consistent with this Court's recent opinion in *Ornelas v. United States*, ___ U.S. ___, 116 S.Ct. 1657 (1996). It in no sense adopted or utilized a "subjective standard" to assess reasonable suspicion.

Petitioner's contention that New Jersey applies a subjective standard is wrong. Thus, his argument focuses not on an erroneously stated rule of law, but on a correctly stated rule's application to the particular facts of his case. His petition does not present a substantial question and should be denied. *Compare* SUP. CT. R. 10(c) *with* SUP. CT. R. 10, ¶ 2 ("A petition for a writ of *certiorari* is rarely granted

when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Moreover, the New Jersey courts properly applied the correct law to the particular facts of defendant's case. That the courts' analyses and judgments are correct is a second reason that a writ of *certiorari* should be withheld.

A traffic stop constitutes a seizure within the meaning of the Fourth Amendment. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1395-96 (1979). Because a traffic stop is a more limited seizure, however, it is more like an investigative detention than a custodial arrest, and the analysis set forth in *Terry v. Ohio*, *supra*, applies. *See Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 3149-50 (1984); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95 S.Ct. 2574, 2582 (1975).

Terry requires that a police officer have a reasonable suspicion, based on articulable facts, that criminal activity is afoot. 392 U.S. at 29, 88 S.Ct. at 1884-85. Reasonable suspicion is "a particularized and objective basis for suspecting the person stopped of criminal activity." *Ornelas v. United States*, *supra*, ___ U.S. at ___, 116 S.Ct. at 1661 (internal quotation omitted). It requires that the officer "be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *Alabama v. White*, 496 U.S. 325, 329, 110 S.Ct. 2412, 2416 (1990). The quantum of articulable suspicion that is required is less than that required for probable cause. *United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585 (1989).

Courts assessing the validity of a *Terry* stop must consider the totality of the circumstances. *United States v.*

Cortez, 449 U.S. 411, 417-18, 101 S.Ct. 690, 695 (1981). In determining whether the officer's actions were reasonable, it is appropriate to consider "the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, *supra*, 392 U.S. at 27, 88 S.Ct. at 27. Significantly, the "totality of the circumstances" may be based entirely on lawful conduct, for a combination of potentially innocent factors can alert the trained eyes of a police officer to illegal activity. *United States v. Sokolow*, *supra*, 490 U.S. at 9, 109 S.Ct. at 1586; *see also United States v. Sharpe*, 470 U.S. 675, 682 n.3, 105 S.Ct. 1568, 1573 n.3 (1985).

The "sole issue" that the New Jersey Superior Court, Appellate Division decided was "whether Patrolman Rossbach had an articulable basis for a reasonable suspicion that [petitioner] was driving while intoxicated." Pet. App., at p. 3a.

New Jersey's drunk driving statute proscribes operation of a motor vehicle while under the influence of intoxicating liquor. N.J. STAT. ANN. 39:4-50(a) (West 1998). As a matter of state law, "[u]nder the influence" is defined as "a condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on a highway." *State v. DiCarlo*, 338 A.2d 809, 813 (N.J. 1975); *see State v. Johnson*, 199 A.2d 809, 819-20 (N.J. 1964).

To conduct a constitutionally valid motor vehicle stop for violation of N.J. STAT. ANN. 39:4-50(a), therefore, the totality of the facts must support an objectively reasonable suspicion that the driver's impairment of

judgment or control renders improper his operation of a vehicle on the roadways.

The primary ground upon which petitioner contends his stop was invalid is that the officer did not observe him commit a motor vehicle violation. However, consistent with *Sokolow*, observation of decidedly unlawful conduct would not be a necessary prerequisite to a valid investigative stop, so long as the totality of the circumstances otherwise led the objectively reasonable police officer to suspect petitioner was operating his vehicle while intoxicated.

Numerous courts have so held specifically in the context of motor vehicle stops. *See e.g., Hamman v. State*, 883 P.2d 994, 995 (Alaska App. 1994) ("[I]t was not necessary for [the defendant] to violate a traffic law before stopping him. A police officer need not 'see the person he ultimately stops *do* something dangerous . . . It is sufficient if the officer observes facts which lead him to reasonably believe that the person to be stopped *is* dangerous.' ") (quoting *State v. Moran*, 667 P.2d 734, 736 (Alaska App. 1983) (emphasis in original)); *State Dep't of Highway Safety v. DeShong*, 603 So.2d 1349, 1352 (Fla. App. 1992) ("Driving behavior need not reach the level of a traffic violation in order to justify a DUI stop."); *Brown v. State*, 595 So.2d 270, 270 (Fla. App. 1992) (upholding stop for suspected DUI, and indicating "It is true that apparently no traffic offense was involved. However, the absence of such an offense does not establish the absence of a valid objective basis for the stop."); *State v. Field*, 847 P.2d 1280, 1285 (Kan. 1993) (stating that "There is no requirement that the officer actually observe a traffic violation being committed" to legally stop a vehicle for

suspected DUI); *see also Ebona v. State*, 577 P.2d 698, 701 n.12 (Alaska 1978) (deeming lawful stop to investigate suspected DUI while acknowledging the officer did not observe violation of any traffic rules and the motorist did successfully make two correct turns); *Davis v. State*, 923 S.W.2d 781, 784, 788 (Tex. App. 1996) (upholding stop for suspected DUI while noting the officer observed "no specific traffic violation"), *rev'd on o.g.*, 947 S.W.2d 240, 245 (Tex. Crim. App. 1997).

Thus, observation of a traffic violation for which a citation could have been issued was not indispensable to execution of a lawful stop of petitioner's vehicle. Further, the investigative stop of petitioner's vehicle was constitutional, because the totality of the facts articulated by Officer Rossbach supported an objectively reasonable suspicion that petitioner was operating his vehicle under the influence of an intoxicant.

First, petitioner was driving his vehicle at or around 2:00 or 2:30 in the morning at the time his unusual driving was observed and he ultimately was stopped. Pet. App., at pp. 3a, 10a.

In evaluating the reasonableness of an investigative stop for DUI, courts recognize that the lateness of hour is a relevant factor that should be considered among the totality of the circumstances, because "intoxicated drivers are more likely to be on the road at such an hour." *Hamman v. State, supra*, 883 P.2d at 995 (3:00 a.m.); *see Piercefield v. State*, 871 S.W.2d 348, 351 (Ark. 1994) ("lateness of hour"); *Edwards v. State*, 464 S.E.2d 851, 857 (Ga. App. 1995) (a little before midnight); *State v. Cusack*, 649 A.2d 16 (Me. 1994) (just prior to 3:00 a.m.); *Davis v. State, supra*, 923 S.W.2d at 784, 788 (1:00 a.m.).

Second, Patrolman Rossbach's attention initially was drawn to petitioner's vehicle, because petitioner had put his car in reverse in a parking lot, but then remained motionless for approximately two minutes before backing his vehicle out of the parking spot. Pet. App., at pp. 3a, 10a. Patrolman Rossbach subsequently observed petitioner activate his left-hand signal well in advance of actually making the intended left turn. Pet. App., at pp. 3a, 10a.

A motorist's unusual or delayed responses in operating his vehicle are articulable indicia supportive of an objectively reasonable suspicion that the motorist is intoxicated or otherwise impaired. *See, e.g., United States v. Rehkop*, 96 F.3d 301, 305 & n.5 (8th Cir. 1996) (remaining stationary through three rotations of traffic light deemed legitimate, objective factor supporting suspicion of DUI); *see also People v. Christie*, 520 N.W.2d 647, 648-49 (Mich. App. 1994) (activating turn signal prematurely (0.2 of a mile before making turn) objectively indicated that the driver could be under the influence of intoxicants); *cf. United States v. Lee*, 73 F.3d 1034, 1038 (10th Cir. 1996) (straddling center line for 100 to 150 feet (*i.e.*, one second) before proceeding into right lane deemed legitimate, objective factor supporting the suspicion that the driver was intoxicated).

Third, Patrolman Rossbach observed petitioner driving at an excessively slow speed: five to ten miles per hour in a twenty-five mile per hour zone. Pet. App., at pp. 3a, 10a.

Operation of a vehicle at an unusual or erratic speed has been held an objective, legitimate ground supportive

of a reasonable suspicion that the motorist is intoxicated or otherwise impaired. *See, e.g., Brown v. State, supra,* 595 So.2d at 270 (slowing to 45 mph, then accelerating to 55 mph held supportive of reasonable suspicion); *State Dep't of Highway Safety v. DeShong, supra,* 603 So.2d at 1352 (slowing from 55 mph to 30 mph, then accelerating again held supportive of reasonable suspicion).

More specifically, it uniformly has been recognized that traveling at an inordinately slow rate of speed is an objective factor upon which reasonable suspicion of driving under the influence could be based. *See, e.g., United States v. Banks,* 971 F. Supp. 992, 993, 996 (E.D. Va. 1997) (driving 5 to 7 miles per hour below posted speed limit); *United States v. Higareda-Santa Cruz,* 826 F. Supp. 355, 356, 358 (D. Or. 1993) (driving 40 to 45 mph in a 55 mph zone); *Bailey v. State,* 319 So.2d 22, 26 (Fla. 1975) (traveling at a "slow rate of speed"); *Edwards v. State,* 464 S.E.2d 851, 857 (Ga. App. 1995) (traveling 45 mph in a 65 mph zone); *Sell v. State,* 496 N.E.2d 799, 800 (Ind. App. 1986) (traveling 35 to 40 mph in a 55 mph zone for two to three minutes, backing up traffic); *State v. Cusack,* 649 A.2d 16 (Me. 1994) (driving 15 mph below posted speed limit); *State v. Ratliff,* 728 P.2d 896, 899 (Or. App. 1986) (driving 20 to 25 mph in a 55 mph zone), *aff'd,* 744 P.2d 247 (Or. 1987); *State v. Brothers,* 828 S.W.2d 414, 416 (Tenn. Cr. App. 1991) (driving 10 mph under speed limit); *Freeman v. Commonwealth,* 460 S.E.2d 261 (Va. App. 1995) (traveling 10 to 15 mph below posted limit).

Additionally, courts have opined that a motorist's maintenance of erratic or excessively slow speeds could be an objective indicator of his or her "consciousness of guilt" and desire to avoid apprehension by the police. *See*

United States v. Romulus, 949 F.2d 713, 717 (4th Cir. 1991) (hitting brakes upon observation of police vehicle, plus continued slowing to avoid passing police car, supported independent basis for suspecting driver was intoxicated or unlicensed); *State v. Ratliff, supra*, 728 P.2d at 898-99 (discussing "drive/stop/proceed" pattern drunk drivers utilize when they are aware of a police vehicle on the road, in order to avoid being apprehended). *Compare* Pet. App., at p. 5a (holding that the factors relied upon by Patrolman Rossbach provided an objectively reasonable basis for suspecting "that [petitioner's] driving was unusually hesitant and excessively cautious because [petitioner] was aware that his ability to drive safely had been impaired by alcohol.").

Finally, Patrolman Rossbach had thirteen years of law enforcement experience as of the time he made the observations of defendant's vehicle operation and determined an investigative stop was justified in light of the circumstances. Pet. App., at p. 5a.

Courts have emphasized a respective police officer's experience when they assess the totality of objective facts known to the officer and evaluate the "inferences and deductions" such a trained officer could draw from those facts. *United States v. Cortez, supra*, 449 U.S. at 418, 101 S.Ct. at 695. Applying this principle in the specific context of motor vehicle stops for suspected DUI, see *Hamman v. State, supra*, 883 P.2d at 995; *Brown v. State, supra*, 595 So.2d at 270; *State v. Field, supra*, 847 P.2d at 1285; *State v. Ratliff, supra*, 728 P.2d at 898-99; *Freeman v. Commonwealth, supra*, 460 S.E.2d at 262. *See also State v. Brothers, supra*, 828 S.W.2d at 416 (noting fact that defendant was driving ten miles below the speed limit and

emphasizing the officer's experience, as reflected by his testimony that, "a lot of people under the influence of some type of intoxicant, this is what you look for.").

Thus, each of the facts Patrolman Rossbach articulated were legitimate and have been relied upon by courts around the country in assessing the objective reasonableness of motor vehicle stops for suspected DUI. Properly, the New Jersey courts considered the totality of those facts, *United States v. Cortez, supra,* 449 U.S. at 417-18, 101 S.Ct. at 695, taken together with the rational inferences that an experienced police officer could draw from them, *United States v. Sokolow, supra,* 490 U.S. at 9, 109 S.Ct. at 1586, to evaluate the reasonableness of the stop. *See* Pet. App., at pp. 5a, 10a-11a.

Upon performing this analysis, the state courts correctly determined that the stop was constitutional, because the facts articulated by Patrolman Rossbach supported an objectively reasonable suspicion that petitioner's judgment and perception were impaired and control over his vehicle was adversely affected as a consequence thereof. "The purpose of an investigative stop is to clarify ambiguous situations." *State v. Cox,* 523 N.W.2d 52, 61-62 (Neb. App. 1994), *aff'd,* 529 N.W.2d 795 (Neb. 1995). The Constitution does not require a police officer who observes signs of impaired driving to wait until the motorist actually endangers the public or himself to perform a stop and ensure that the motorist can proceed in a safe manner. Under these facts, "[i]t would have been poor police work indeed" for a patrolman of thirteen years experience to have failed to investigate further petitioner's capacity to drive safely. *Terry v. Ohio, supra,* 392 U.S. at 22-23, 88 S.Ct. at 1880-81. The stop was valid.

The New Jersey courts applied the correct legal standard, engaged in the correct analysis of the facts consistent with that standard, and arrived at the correct result. There is no substantial question raised by the instant petition for *certiorari*. It is respectfully submitted that said petition should be denied.

CONCLUSION

For the foregoing reasons and authorities cited in support thereof, respondent respectfully requests this Court deny petitioner's application for a writ of *certiorari*.

Respectfully submitted,

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